Regency Service Carts, Inc. *and* Giovanni Trevisano *and* Roberto Vasquez *and* Benjamin Ramirez *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO

Regency Service Carts, Inc. *and* Elick Dargan, Petitioner *and* Journeymen's and Production Allied Services of America and Canada International Union Local No. 157. Cases 29–CA–17953–1, 29–CA–17953–2, 29–CA–17953–4, 29–CA–18465, and 29–RD–758

April 10, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On April 26, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, the Union filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified,[2] with the following exception. The judge found that three employees engaged in a brief, spontaneous walkout on January 14, 1994. In its exceptions, the Respondent contends that the walkout was unprotected because it violated the no-strike clause in the parties' collective-bargaining agreement. As the record is unclear as to the viability of the collective-bargaining agreement at the time of the walkout or, even assuming the viability of the agreement, as to the applicability of the no-strike clause at that time under the circumstances of the case, we sever and remand that portion of the case to the judge for the taking of additional evidence on those issues, and for the issuance of a supplemental decision containing findings of fact, conclusions of law, and a recommended supplemental Order.

ORDER

The National Labor Relations Board orders that the Respondent, Regency Service Carts, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities and sympathies, creating the impression that the employees' union activities are under surveillance by the Employer, promising employees benefits for not engaging in union activities, threatening employees that it would close the business in order to discourage them from engaging in union activities or threatening employees with layoff, discharge, and other reprisals because they had engaged in union activities.

(b) Discharging or laying off and failing and refusing to recall employees or canceling the health insurance of employees because of the union activities in which they and other employees were engaged.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Rivera full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and reinstate Elick Dargan's health insurance.

(b) Make Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Ri-

[1] The Respondent and Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that, although Theodore Jones did not testify, he was unlawfully swept up with those employees who were laid off because of their known, perceived, or suspected union activities. In support of that conclusion, the record shows that on March 23, 1994, Jones attended a union meeting at a subway station near the Respondent's plant, and that on April 22, 1994, he attended a meeting held openly across the street from the plant's front entrance. The April 22 meeting was observed for a time by Plant Manager Pezulich. We find, therefore, that the record supports an inference that the Respondent had knowledge of Jones' union activity. See *Yaohan of California, Inc*., 280 NLRB 268 (1986); and *BMD Sportswear Corp*., 283 NLRB 142 (1987).

We adopt the judge's finding overruling the challenges to the ballots of Keith Jackson, Jerome Smith, and Rocco Lacona, because Jackson and Smith had a reasonable expectation of recall and Lacona was an assembler working within the production and maintenance unit.

In the absence of exceptions, we adopt, pro forma, the judge's findings overruling the challenges to the ballots of Marian Faryniarz, Lawnce Mollison, Jose Veliz, Jean Lubin, Theodore Jones, Rubin Ramos, Lendo Bronson, Anthony Thames, Yevgeny Chernyakov, and Ellsworth Quammie.

We correct the judge's inadvertent reference in sec. 8, Analysis—The Challenges, of his decision to Anthony James instead of Anthony Thames.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

vera whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the notice, on forms marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 16, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded to Judge Michael O. Miller for the purpose of arranging a hearing to take evidence on the issues we remanded.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations to the Board. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

IT IS FURTHER ORDERED that Case 29–RD–758 is remanded to the Regional Director with a direction to open and count the ballots of Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, Anthony Thames, Jerome Smith, Lendo Bronson, Keith Jackson, Rubin Ramos, Yevgeny Chernyakov, Ellsworth Quammie, and Rocco Lacona and to prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you about your suspected union activity, nor about concerted activity in which you engage for the mutual aid or protection of yourselves and your coworkers.

WE WILL NOT create the impression that your union activities are under our surveillance.

WE WILL NOT promise you benefits for not engaging in union activities.

WE WILL NOT threaten that we will close the business if you engage in union activities.

WE WILL NOT threaten to lay you off for engaging in union activities.

WE WILL NOT threaten to discharge you or with other reprisals for engaging in union activities.

WE WILL NOT lay off and fail and refuse to recall Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Rivera, or any other employee, because of their union activities and the union activities of other employees.

WE WILL NOT cancel the health insurance of Elick Dargan, or any other employee, for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Rivera full reinstatement to their former jobs

or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, reinstate Elick Dargan's health insurance coverage.

WE WILL make Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Rivera whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL make Elick Dargan whole for any premiums paid or medical expenses incurred as a result of our unlawful actions plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful layoffs of Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Rivera and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

REGENCY SERVICE CARTS, INC.

Sharon Chau, Esq. and *Emily DeSa, Esq.*, for the General Counsel.
Jeffrey P. Pollack, Esq. (Horowitz & Pollack, P.C.), for the Respondent.
Seth Kupferberg, Esq. (Sisper, Weinstock, Harper & Dorn), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Brooklyn, New York, based on charges filed by the various Charging Parties named above[1] and a complaint which was issued by the Regional Director for Region 29 of the National Labor Relations Board (the Board) on March 31 and October 21, 1994. The consolidated complaint alleges that Regency Service Carts, Inc. (Respondent or Regency) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily discharging or laying off employees because of their union or other protected concerted activities and by otherwise interfering with, restraining, and coercing employees in the exercise of their statutory rights. Respondent's timely filed answer denies the commission of any unfair labor practices. Consolidated for hearing with those unfair labor practice allegations were certain challenges to ballots cast in the election held in Case 29–RD–758.

[1] The charges in Cases 29–CA–17953–1, 29–CA–17953–2, and 29–CA–17953–4 were filed by Trevisano, Vasquez, and Ramirez, respectively, on January 18, 1994; the charge in Case 29–CA–18465 was filed by Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO on August 15, 1994.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the all parties,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture and nonretail sale of restaurant and hotel equipment at its facility in Brooklyn, New York. Jurisdiction is not in dispute. The complaint alleges and Respondent admits facts sufficient to establish, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find and conclude that both Iron Workers Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (Local 455) and Journeymen's and Production Allied Services of America and Canada International Union Local 157 (Local 157) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures and repairs commercial kitchen equipment such as carts and chafing dishes. It has two buildings in Brooklyn, New York, on adjacent streets. Its managerial hierarchy consists of Giacomo Abatte Sr., president; Jack Abatte Jr. and Connie Pezulich,[3] vice presidents; John Pezulich, general manager; and Robert Pezulich, Carl Cocchiola, Joseph Toussaint, and Pablo Gonzalez, supervisors. In about November 1993, Respondent opened a repair and sales facility in Las Vegas, Nevada, under Jack Abatte Jr.

For an undisclosed number of years, Regency's approximately 50 employees have been represented by Local 157. The most recent contract expired in 1991 and, while the 1991 collective-bargaining agreement purports to continue by its terms from year to year, no new agreement has been negotiated. It was the perception of at least some of the employees that they were receiving very little representation from Local 157 and few of the benefits under its contract.

B. *The Discharges of Trevisano, Vasquez, and Ramirez*

1. The facts

Ruperto Vasquez, a nickel plater, first worked for Regency in 1987, left in 1990, and returned sometime thereafter. He was a member of Local 157. Starting in late 1991, he began to notice that certain contract benefits, to which he believed himself entitled, were no longer being paid. He discovered

[2] It ill behooves the General Counsel to move that I reject Respondent's brief as untimely filed where its own brief was received after that of the Respondent due to the fact the General Counsel's brief was inadvertently misaddressed. That motion is denied and I find it unnecessary to consider Respondent's response thereto. The briefs of all parties have been considered.

[3] Connie Pezulich is the daughter of Giacomo Abatte Sr. and the wife of John Pezulich.

that he no longer had health insurance.[4] He also found that he did not receive an expected wage increase in March 1993 and was not paid for sick leave which he took in September 1993. His attempts to secure these benefits by raising the issues with the union steward, Elick Dargan, were unavailing.

Benjamin Ramirez began working for Regency in September 1991. Although he worked in the plating department with other unit members, including Vasquez and Giovanni Trevisano, he was never given an application for membership in Local 157. He never sought out that union and never became a member. Ramirez had no health insurance from his employer and, in October 1993, found that he was not paid for a claimed sick day.

Trevisano was an electroplater who began his Regency employment in 1983. He had some lead functions in the plating department but did not possess statutory supervisory authority. In the fall of 1993, Abatte Jr. asked him if he was interested in moving to the soon-to-be opened Las Vegas operation and gave him a $3-per-hour wage increase.[5] Trevisano made substantial demands on Respondent in return for moving to Las Vegas and the transfer never came about.

On Friday, January 14, 1994,[6] around noon, the paychecks were distributed. Trevisano found that his wage had been reduced by $3 per hour and that he had not been paid vacation pay he had expected. At the same time, Vasquez observed that he had not been paid for a day of sick leave he had been granted on December 29, 1993, and Ramirez noted that he had not received certain vacation pay to which he believed himself entitled. The employees talked among themselves, expressing their concerns about the lost benefits. Trevisano told Dargan about his problems and threatened to file some sort of a charge or complaint with or against Local 157. The employees also talked to the plating room supervisor, Cocchiola, directly and through Trevisano as their spokesman. Cocchiola referred them to John Pezulich (hereinafter referred to as Pezulich; Connie Pezulich will be referred to by her full name.)

Trevisano went to Pezulich and questioned the reduction in his wage and the missing vacation pay. Pezulich said that there was nothing he could do, that it was the owners' (i.e., the Abattes') decision. He told Trevisano that the Company was having financial problems. When Trevisano insisted that ''it was not right'' and that he intended to do something about it, Pezulich told Trevisano that he could take it up with Local 157. Trevisano threatened to leave and do just that if he did not get a more satisfactory answer by 2 p.m. He did not change his mind when told that Giacomo Abatte had left for the day and would not return until the next workday. This conversation was repeated several times but Pezulich never satisfied Trevisano's complaints.

Trevisano told Vasquez and Ramirez that he was going to go to Local 157 to file some sort of a complaint or grievance. When they asked if they could go with him, he referred them to Pezulich. Each of them, I find, discussed his problem with Pezulich. Pezulich either suggested that they take their concerns to Local 157 or they asked him if they could do so and he told them that they could. They understood this to be permission to leave before the end of the workday; I do not find that Pezulich so intended it.

After the lunchbreak, Trevisano told Cocchiola that he had spoken to Pezulich. As recalled by Cocchiola, Trevisano said, ''He was going to leave at 2:00 in the afternoon, along with the two other guys that worked in the room if he didn't get an answer from John [Pezulich] pertaining to the change in his salary . . . that they were not going to wait'' for Giacomo Abatte, and ''[t]hey were going to quit, leave and that was the end of it.'' Cocchiola told Vasquez and Ramirez that they were ''crazy'' to walk out as a group. He allegedly told all three of them that they were ''crazy'' to be ''quitting for no reason.'' They replied that ''they felt that they should stick together and they were all going to leave.'' Both Cocchiola and Pezulich observed the three employees leave ''as a group.'' They took their dirty laundry, which normally went home with them on Fridays, as well as a toaster oven and radio which usually remained in the shop. After they left, Pezulich marked their timecards ''Walked out'' with a direction to the bookkeeper to check to see if they had any holidays or vacation coming to them.

When they left, there was a small amount of product in the plating solution. They believed that Cocchiola was going to complete their usual duties, which basically consisted of dipping the pieces in various solutions.[7]

On leaving the plant at 2:20 p.m., the three employees went to Trevisano's home. Trevisano called Local 157 and spoke to their business representative, Vincent. They complained that they were not getting any help from the Union. Vincent said he would get back to them. When he called back, about 15 minutes later, he told them not to worry but noted that the Company was having financial difficulties.[8] He promised to come to the plant on Tuesday (which was the next workday, Monday being the Martin Luther King holiday) to work things out but he could not tell them what time he might be there. The employees deemed Vincent's response to be a run around and agreed that they would go to the union office on Monday.

The three men went to Local 157's office on Monday. Notwithstanding that it was a holiday, they found someone, not Vincent, to talk to. Again, they were assured that a representative would come to the plant on Tuesday and, again, they were not convinced that they would get any help from Local 157. They made plans to go to the NLRB on the following day.

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[4] Company records indicate that Respondent terminated its health insurance coverage in January 1993 (R. Exhs. 1–2).

[5] Trevisano claimed that he received the raise because he was doing a good job. Abatte Jr. contended that the raise was meant to compensate him for moving and to equalize his pay with others who were transferring. The difference is irrelevant.

[6] All dates hereinafter are 1994 unless otherwise specified.

[7] The foregoing is my amalgamation of the testimony of the five witnesses, accepting that which was most credibly offered in light of the probabilities and language barriers. Noting that they sought Local 157's help to resolve these ongoing issues, i.e., to secure future benefits to which they felt entitled, and either returned to work expecting to punch in, or called in sick, on the next workday, I do not find that they either intended to quit or expressed any intention to do so. To the extent that both Pezulich and Cocchiola claimed that each time the employees said they were going to leave, they also said that they were ''quitting,'' I find their testimony contrived and not worthy of belief. That the employees took the radio and toaster with them suggests that they did not know when they might return; it does not establish that they quit.

[8] This testimony of Trevisano suggests, but does not establish, that Vincent called Respondent on their behalf that day, as the General Counsel asserts.

On Tuesday, January 18, before going in to work, Trevisano and Vasquez visited the NLRB office in Brooklyn where they spoke with the information officer. They explained their problem and that Board agent called Local 157 on their behalf to secure some help for them. Trevisano and Vasquez left the Board's office and went to the plant.

On arriving at the plant, Trevisano and Vasquez found that their timecards had been pulled from the rack. Initially, Pezulich told them that they had walked out and were fired. They argued over whether Pezulich had given them permission to leave and requested whatever pay was due them. Pezulich went to the office, returned, and told them that they had quit and thus had nothing coming. Ramirez did not go in to the plant that day; he called in sick. Pezulich told him he had been fired.[9] Vasquez and Ramirez received pay for the days they believed they were entitled to in their final paychecks.

2. Analysis

The General Counsel contends that Respondent discharged these three employees because they sought to file grievances with their then collective-bargaining representative, Local 157. The General Counsel theorizes that Respondent feared that it would be required to comply with its contractual obligations in the future if these employees took their complaints to that Union. Respondent contends that they quit.

The truth, I find, lies someplace between these positions. As I find the facts, the employees complained concertedly, among themselves and to their supervisors, about what they perceived to be adverse changes in their working conditions. Pezulich told them that he was powerless to help them and either suggested that they take their problems to Local 157 or, at least, interposed no objection to their doing so. They assumed that he had agreed to their leaving at that time, before the end of their shift; Pezulich, however, had no such understanding. They left as a group to take their complaints to Local 157, they were observed leaving together and Respondent knew why they were leaving. They intended to return and did not say that they were quitting. On their departure, Pezulich wrote that they had ''walked out'' on their timecards and they were terminated either at that moment or when they sought to return, sometime after the start of their shift on the next workday.

What the foregoing describes is a concerted and thus protected walkout in protest of perceived adverse changes in their conditions of employment. That walkout demonstrated that the employees would act together for their mutual protection and, ''because the striker's endeavor was inoffensive to statutory policy, it fell within Section 7 guarantees, without inquiry as to whether the underlying grievance was meritorious.'' *Cub Branch Mining*, 300 NLRB 57, 58 (1990). As the judge stated, id. at 59:

> Ordinarily, any management action detrimental to participants in a protected work stoppage is sufficiently destructive of employee rights to be presumptively unlawful. As such, at a minimum, the employer is impelled to substantiate an overarching business justification. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

No such business justification has been demonstrated. Respondent has not even shown that it had any established rules concerning leaving work early or that employees had suffered discipline for such conduct in the past. Neither has it shown that it was more than inconvenienced by the early departure of these three employees.

The walkout was brief and spontaneous. There was no evidence that it was part of a plan or pattern of intermittent work stoppages such as would be inconsistent with a genuine strike. ''Such a single concerted walkout is presumptively protected.'' *Daniel Construction Co*., 277 NLRB 795 (1985), citing *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). See also *Robbins Engineering*, 311 NLRB 1079, 1083–1084 (1993).

Accordingly, I find that by discharging Giovanni Trevisano, Ruperto Vasquez, and Benjamin Ramirez for participating in a protected concerted work stoppage, Respondent has violated Section 8(a)(3) of the Act.[10]

B. *Activity on Behalf of Local 455*

On January 28, Elick Dargan filed the decertification petition involved here, seeking a vote to remove Local 157 as collective-bargaining representative. Local 455 began organizing among Respondent's employees in February. A hearing was held at the NLRB offices on February 16; no representatives of Local 157 appeared. However, Local 455 intervened in the proceeding.

John and Connie Pezulich attended this hearing, along with Dargan, Reinaldo Rivera, and the three employees discussed above. As the appearance forms were passed around, Pezulich questioned Local 455's presence. This was Pezulich's first notice of Local 455's interest. When told that they were intervening in the proceeding and had expressed an interest in representing the employees, he stated, ''I don't care if they want to throw Local 157 out, but I'm not going to have another union come in.'' The Board agent told him that it was not up to him. Connie Pezulich questioned whether the Employer had any say in the matter and Pezulich stated that he was not going to have the Union come in and tell him how to run his business. ''This union is not to my benefit,'' he stated at one point. Pezulich had come into the hearing with a smile on his face; he left in anger.[11]

C. *Alleged 8(a)(1) Violations*

1. February 16 interrogation—Pezulich

On his return from the hearing, Pezulich came up to Faryniarz at his work station. He told Faryniarz that they had been talking about unions and that unions were not needed

[9] Other than to deny speaking to Vasquez or Ramirez after January 14, Pezulich did not contradict this testimony. I credit the employees. Whether he spoke to each of them, or only to Trevisano, it is clear that they were terminated at or before that point.

[10] This finding is fairly encompassed within the language of the complaint, charging Respondent with discharging them for concertedly seeking to file grievances and in order to discourage those and other concerted activities engaged in for mutual aid and protection. It was also fully litigated. *Chelsea Homes*, 298 NLRB 813 (1990).

[11] Other than denying that he had expressed surprise at the presence of Local 455, Pezulich did not contradict the foregoing credible testimony of Elick Dargan and Anthony Rosaci, Local 455's financial secretary.

at Regency. He asked Faryniarz for his opinion. Faryniarz said that as a ''physical worker,'' he supported the new union and explained why. He spoke of the dissatisfaction with the representation by Local 157 and of the employees' desire for insurance and better wages. While he sympathized with Pezulich's opposition to unions as an owner, he said, he supported the Union as an employee.

Pezulich replied that he could give increases in wages and then asked Faryniarz to poll the other Polish and Russian workers as to their opinions about the Union. Faryniarz complied; he questioned six employees and reported the results of that poll to Pezulich.[12]

Faryniarz was not an open and active union supporter, such as might excuse an interrogation into his union sentiments under *Rossmore House*, 269 NLRB 1176 (1984). Pezulich's questioning of how Faryniarz felt about unions, particularly when coupled with his own expression of hostility toward them and his implied promise of benefit, had a reasonable tendency to coerce this employee in the exercise of his Section 7 rights. It is irrelevant that Faryniarz gave him a frank and honest answer, acknowledging his support for the union activity. *Sunbelt Mfg.*, 308 NLRB 780 fn. 1 (1992). Moreover, Pezulich enlisted Faryniarz to poll other employees on his behalf. There is no justification for an employer to ask an employee to identify other potential union supporters. *BRC Injected Rubber Products*, 311 NLRB 66, 72 (1993).

2. Surveillance and creating the impression of surveillance—Toussaint

On February 23 or 24, a group of employees met in a schoolyard on President Street. As they gathered, Joseph Toussaint drove by. Dargan waved at him, but Toussaint did not wave back or otherwise acknowledge Dargan. It appeared to Jean Lubin that Toussaint closed his eyes and shook his head when observed driving slowly past the group.

On the following morning, as he went to work, Dargan saw Toussaint and Pezulich engaged in a conversation. He heard but one word, Toussaint saying ''meeting.''

Toussaint testified that he was merely driving home when he saw some of the employees on President Street. That street, he described, is parallel to Carroll Street, on which the plant is located. They are one-way streets, with traffic going in opposite directions. In order to go home, he drives one block on Carroll, takes a left, and goes left again in the opposite direction on President. That is what he was doing when seen by the assembled employees.

While the complaint alleged surveillance by Toussaint on or about this date and counsel for the General Counsel adduced the foregoing evidence, her brief omits any reference to either this evidence or the allegation. I take that omission to be an implicit acknowledgment that this evidence does not rise to a level which will support such an allegation. I shall recommend that it be dismissed.

In March, sometime after Pezulich's meeting of March 9, discussed infra, Toussaint told Reinaldo Rivera that ''every time we had a meeting, he found out . . . that he had seen Mario [Faryniarz] park his car in front of the train station'' where another union meeting had been held.

This testimony stands uncontradicted. It implies that Respondent knew when and where union meetings were held and further, that those meetings were under surveillance. As such, it warrants a finding that Toussaint violated Section 8(a)(1) when he created the impression of surveillance. *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 627 (1987).

3. Promise of benefits and implied threat—Toussaint

On February 17, Toussaint told Reinaldo Rivera that if he had known that Rivera was going to go to the hearing he would have stopped him. He suggested that Rivera think about what he was doing because, if he were to be laid off, the other employees would not support him. Finally, he told Rivera that he was going to ask Giacomo Abatte to give him a raise. Rivera protested that he didn't want a raise, he wanted health insurance. Toussaint then went to the office and, on his return, told Rivera that the senior Abatte ''had accepted, that he was going to give me a personal medical plan and a raise . . . that Jack had agreed that if I don't come to the hearing again I was going to get a raise''[13]

By the foregoing, I find, Respondent promised Rivera a raise and other benefits if he would refrain from further union activity and threatened him with layoff if he did not. Such promises and threats violate Section 8(a)(1).

4. Promise of benefits–Giacomo Abatte Sr.

Some time in February, Abatte Sr. asked Marian Faryniarz if he was interested in transferring to Las Vegas. The evidence fails to reflect when this occurred, other than ''much earlier'' than Faryniarz' March 24 layoff; it also fails to include any promises of benefit contingent on his union sympathies. Noting that Respondent had been staffing its Las Vegas operation with employees from the Brooklyn plant since at least November 1993, I am unable to conclude that this occurred after the appearance of Local 455 or had any connection to it. I shall recommend that this allegation be dismissed.

5. Interrogation—Gonzalez

On at least one occasion in March, Pablo Gonzalez asked silver solderer Lawnce Mollison who he was voting for. Mollison did not reply. There is no evidence that Mollison was an open or active union supporter. This interrogation violates Section 8(a)1).[14]

6. March 9–John and Connie Pezulich and Toussaint

Respondent held a meeting of its employees on March 9 in which both John and Connie Pezulich spoke. In the course of this meeting, John Pezulich told the employees that:

[12] Faryniarz' detailed and credibly rendered testimony is uncontradicted. He described this conversation as taking place on Pezulich's return from the hearing but misstated that date as March 14. In another conversation which Faryniarz could only date as having occurred when Pezulich ''came from some meeting,'' Pezulich asked Faryniarz if he ''supported the socialistic union?''

[13] Rivera testified through an interpreter and the foregoing, where not placed within quotation marks, is what appears to be the import of his testimony. His testimony stands uncontradicted.

[14] Gonzalez, when asked whether he had any conversations with Mollison, related a conversation about Mollison's attention to his duties. He did not contradict Mollison's testimony with regard to this interrogation.

> [T]hey did not want . . . any union in his shop, that there would be no more favors, that he had always tried to be nice and you want to go out and get another union, and the doors might close, and I might close the door . . . there would be no one coming in and telling him how to run his business.

One employee asked whether there would be raises if they did not vote for a union, Pezulich said that it was ''possible.'' Another recalled Pezulich as saying he would extend them no more loans or do them other favors and two employees recalled him saying that if the new union came in he would be forced to shut the plant down or move out. As those employees, Rivera and Faryniarz, recalled Pezulich's words, his ire was essentially directed at the idea that a different union would replace Local 157.

Connie Pezulich asked Elick Dargan what he would do if he were laid off. He responded that it would not be what he wanted but that he would find another job. Mollison recalled her saying that they could not afford the kinds of things the employees were seeking, such as health insurance and better wages and that, if they voted for the Union, she would have to make further cuts.

Immediately following the meeting, Connie Pezulich spoke to Faryniarz. She asked him if he understood the Company's difficult financial condition and told him that they would close the firm and that ''people will go on the street.''

Also after the meeting, Toussaint told Mollison, at his work station: ''Lawnce, don't do anything you will regret.''[15]

This meeting and the surrounding events are replete with clear violations of Section 8(a)(1). There were threats of discharge, plant closure, and the denial of future benefits such as the grant of personal loans and other favors or other unspecified reprisals, threats that selection of the Union as their representative would be futile,[16] and implied promises of benefit if the employees rejected the Union. There were also statements of support for the incumbent union made in the context of the foregoing threats and promises directed at those who would replace that Union with another. The choice of which union shall represent them, if any, is for the employees to make and it is unlawful for an employer to seek to convey the contrary impression. *Medin Realty Corp*., 307 NLRB 497, 502–503 (1992); and *Hudson Neckwear, Inc*., 302 NLRB 93, 95 (1991). I find those violations as alleged in the complaint.

7. Promises of benefit—Robert Pezulich

In mid-March, Robert Pezulich called Faryniarz to the side and offered to show Faryniarz ''a very interesting contract as far as the union was concerned,'' a contract which, he claimed, the firm had. Faryniarz declined the invitation, even when the offer was repeated several times over the next few days.[17] This conduct, I find, was an attempt to induce an individual who was known by then to be a supporter of Local 455 to drop that support based on an implied promise of greater benefits. It violates Section 8(a)(1).

8. Interrogation, threat, and disparagement—Toussaint and Cocchiola

Around March 22 or 23, Toussaint and Cocchiola approached Faryniarz as he was dressing for work. Faryniarz asked Toussaint when the employees would be voting ''on the new union.'' Toussaint replied, ''I don't understand why you are supporting the new union . . . and why you want to lose your work.'' Faryniarz explained his rationale for supporting Local 455, as he had earlier done for Pezulich, that he was concerned about the welfare of all the employees. Cocchiola told Faryniarz that if he were in Faryniarz' place he ''wouldn't support it because a union doesn't do anything, just take money.''[18]

Toussaint's statement to Faryniarz was, at most, a rhetorical question, seeking to make a point rather than to elicit an answer. Its point was that support for Local 455 would cost Faryniarz his job. It may not have been interrogation; it most certainly was a threat, in violation of Section 8(a)(1).

Cocchiola's statement, I find, was merely the expression of his opinion and not the kind of disparagement of the Union such as would violate Section 8(a)(1). *Circuit-Wise, Inc*., 306 NLRB 766, 789 (1992); *Newsday, Inc*., 274 NLRB 86, 95 (1985).

9. Cancellation of Dargan's medical benefits

When he first began working at Regency, Dargan was covered by the employers' Blue Cross health insurance policy. That policy was canceled in January 1993. At some point, Dargan asked that he again be covered because of a health problem in his family. John Abatte Jr. agreed to place him under a policy they had with another carrier for some of their employees.

On about March 17, Dargan was brought into the office to talk with Connie Pezulich. She told him that his policy would be canceled in 30 days, ''until this matter with the union was solved.'' Thirty days later, that policy was canceled.[19]

D. *The Election*

An election pursuant to the RD petition filed by Dargan was conducted on April 22. There were approximately 47 eligible voters. Of these, 15 voted for Local 455, 8 voted for Local 157, 13 voted for no representation, 13 voters were challenged, and 1 voter cast a void ballot. Pursuant to a Sup-

[15] The foregoing is based on the testimony of Dargan, Mollison, Rivera, and Faryniarz. That testimony was credibly offered and is uncontradicted.

[16] That threat is found in Pezulich's statement that there would be no one coming in and telling him how to run his business. That statement, in the context of the other conduct related here, conveys the impression that the employees' support for the Union would be futile. *Our Way, Inc*., 268 NLRB 394, 414 (1983). It is a violation separate and distinct from the threat to close the plant

[17] Faryniarz' testimony was credibly offered and is uncontradicted.

[18] Faryniarz adequately identified the two supervisors by reference to their positions and Toussaint's Haitian heritage. He placed this conversation about 2 days before he was terminated on March 24. His credible testimony is uncontradicted.

[19] Dargan's testimony was somewhat confused, particularly as to dates, and disjointed about what else Connie Pezulich said to him concerning complaints he had made to her husband. It is uncontradicted and, to the extent related above, is credited.

plemental Decision on Objections and Challenges,[20] the 13 challenges were presented to me for decision.

Following the vote, Rosaci, Local 455's representative, met with Reinaldo Rivera and all the challenged voters except Lubin, on the street across from the plant. Their meeting lasted for more than an hour. While they were gathered there, Pezulich stood outside the plant, observing them, and walked past them on his way to his car.

E. *The Layoffs—Alleged Discriminatees and Challenged Voters*

Some, but not all, of those laid off were alleged in timely filed charges to have suffered unlawful discrimination. Those challenged voters who were alleged as discriminatees are Lubin, Veliz, Faryniarz, Jones, and Mollison. Additionally, the complaint alleges that Rivera (who voted without challenge) and Balduccio were discriminatorily laid off. Those laid-off employees whose ballots were challenged but who are not alleged as discriminatees are Thames, Smith, Jackson, Bronson, Ramos, Chernyakov, and Quammie. Rocco Lacona was challenged on the basis that he was a carpenter, outside the unit.

1. Anthony Thames

Anthony Thames was a polisher who had worked for Respondent, off and on, since about 1981. His most recent period of employment began in November 1993. He was laid off around February 10, by Pezulich, prior to the RD hearing. When he asked whether he should apply for unemployment compensation he was told not to worry, that he could expect to be out of work for only 2 to 3 weeks. His efforts to return, made after several weeks and again near the end of 1994, were unavailing.

Pezulich and Toussaint contend that Thames was laid off because of a lack of work and they claim that he had both a very poor attendance record and limited skills. Thames was not questioned about his attendance and no records of his attendance were adduced here. Pezulich did not recall whether he informed Thames of the layoff. It was not claimed that he was permanently terminated; Respondent referred to him as having been ''laid off.''

2. Smith, Jackson, and Bronson

Jerome Smith had been employed as a porter since 1991 or 1992. On February 16 (the day of the RD hearing), after his midmorning break, he noticed that his timecard was missing from the rack. Toussaint told him to talk to Pezulich. He saw Pezulich about 3 p.m., after Pezulich had returned from the hearing. When he asked whether he was being laid off, Pezulich said that he was, that work was slow and, he claimed, that Pezulich would call him back in 2 or 3 weeks to ''let [him] know.'' However, when he checked back about 2 or 3 weeks later, he was told that work was still slow. He requested his accumulated leave and was told that he would have to wait for 6 months or a year. However, after complaining to Dargan, he was sent to see Pezulich. Pezulich gave him a company check for $245; Smith did not understand what it was for. Pezulich acknowledged telling Smith, when Smith asked about returning, that he might have a chance ''if things drastically turned around.''

Smith returned to the Company again around the end of the year, inquiring if it was hiring. Pezulich told him that the Company did not hire back anyone it had fired and refused to reemploy him.

Lendo Bronson worked on silver repairs, learning to be a polisher. He had been employed since 1992 on an off-and-on basis, returning most recently in November or December 1993. On the morning of February 16, he heard rumors of layoffs after which he was told that he would be laid off because ''the period was slow.'' Both Toussaint and Pezulich suggested that he call back and keep in touch. He has called back several times, only to be told that they had no work for him yet. On one occasion, Toussaint told him that ''if the jobs pick up then we'll call him back.''

Keith Jackson did not testify. According to Pezulich, Jackson was trained to be a polisher and was laid off on February 16 for lack of work. Pezulich did not believe that anything was said to Jackson about when he might come back to work.

3. Ramos, Chernyakov, Quammie, and Lacona

The parties stipulated that *Yevgeny Chernyakov and Ellsworth Quammie* were eligible voters somehow left off the eligibility list. Chernyakov was never laid off. When Quammie was laid off on February 16, he was told that he was being laid off along with a number of others, that work was slow, and that he would be called back in a few weeks. He was recalled on March 8, and has worked continuously thereafter.

Rubin Ramos was challenged by the Employer. The only evidence with respect to him is Pezulich's testimony that he quit sometime between April and June.[21]

Rocco Lacona was challenged by the Board agent as not being on the eligibility list and by Local 455 on the grounds that he was a carpenter, excluded from the unit. Pezulich testified that Lacona works in the Union Street facility and for the 3 to 4 years of his employment has been assembling carts and other products made of both metal and wood. The only contrary testimony is that of Ellsworth Quammie who claimed that when he returned following his layoff (March 9) he was assigned to work in the Union Street plant. While there, he observed someone he identified only as Rocco doing the same work as the other carpenters. He had no basis to describe what work Rocco did during those times when he (Quammie) was not present in that plant.

4. Balduccio, Lubin, and Veliz

The consolidated amended complaint alleged, and Respondent's answer thereto admitted, that *Carl Balduccio* had been laid off on March 4. The record, however, establishes that while he worked a short week in the week ending March 9, he was never laid off. No further discussion of Balduccio is warranted. He was an eligible voter; he is not a discriminatee.

[20] The Employer's objections were overruled; Local 455 filed no objections.

[21] The Supplemental Decision on Challenges indicates that Pezulich had claimed that Ramos had been laid off but did not know whether he had been employed at the time of the election. Ramos' name appeared on the payroll of March 9, the eligibility date, as did the names of other employees who were laid off.

Jean Lubin worked from January 1992 until his layoff on March 4, 1994. He was a metal washer; he claimed to have also done some cutting of metal. Pursuant to Pezulich's orders to lay several people off, purportedly because things were slow, Toussaint selected him for layoff. Toussaint volunteered that he told Lubin ''He's going to get laid off because were not that busy so when things get better it will pick up, we're going to call him back.'' No date for his likely return to work was given. He was given two checks before he left.

Lubin had not become a member of Local 157. He testified to having observed Toussaint drive by the employee meeting on President Street in late February.

According to Pezulich, no one has been hired to replace Lubin. Whichever employee is available does whatever washing needs to be done, amounting to 10 to 15 hours of work per week.

Jose Veliz had worked for Respondent from 1985 to 1990 and was rehired in December 1993 when he casually visited the plant to visit a friend. He was a metal polisher. His only union activity consisted of attending the gathering on President Street. Pezulich laid him off on March 4, telling him that ''the job was low and that he was going to call me within two or three weeks.''[22] He was never recalled to work. His telephone calls to Respondent were never returned.

Pezulich contended that Veliz was laid off because he was one of the newest employees, work was slow, and he had to make cuts.

5. Faryniarz, Jones, Mollison, and Rivera

Marian Faryniarz was a skilled and relatively highly paid samplemaker, having started with Respondent in 1984 and earning $16.50 per hour, after a recent $1.10 raise, at the time of his layoff. As described above, he was subjected to interrogation, threats, and promises of benefit in an effort to discourage him from engaging in union activity, he spoke up at the March 9 meeting and he was candid about his support for the Union, even after the Employers' coercive conduct.

On March 23, at about noon, Pezulich handed out the paychecks. He gave Faryniarz two checks and told him, ''I don't have any more work for you . . . this is the last check for you.'' He asked Pezulich for a letter of recommendation and, even though Pezulich had earlier promised to give him one, Pezulich refused because he was ''sending [Faryniarz] for unemployment.'' When Faryniarz came in to vote on April 22, Pezulich asked whether he was working. When Faryniarz replied that he was on unemployment compensation, Pezulich said that he would be back to work in 3 months. He has never been recalled to work.[23]

Retained when Faryniarz was laid off were Nick DeFloria, a samplemaker, who did work similar to that of Faryniarz, and Wojciech Gutkowski, who was Faryniarz' assistant. Florio had longer tenure than Faryniarz and was paid $900 per week ($22.50 per hour). Gutkowski was paid $11 per hour. At the time of his layoff, Faryniarz was capable of performing production work; however, he was paid significantly more per hour than the production employees.

Theodore Jones was a porter whom Respondent laid off on March 23, assertedly for lack of work. When he was laid off, Pezulich told him that work was slow and that he had to be laid off. He asked when he might come back and was told that his recall was a possibility ''if things turned around.'' No one was hired to replace him; his work is done by whomever is available and not otherwise occupied. Jones did not testify and the record does not reflect any union activity by him.

Lawnce Mollison had worked for Respondent since 1989; he was a silver solderer. As reflected above, he was subjected to interrogation by Gonzalez and threats by Toussaint. He was also among the employees who spoke up at the March 9 meeting.

Mollison was laid off about March 24 or 25, by Pezulich. When he asked about the possibility of returning to work, he was assured that he would be recalled ''as soon as things pick up.'' He was given a laudatory letter of recommendation and three checks. In mid-April, he also got a check for accumulated vacation pay. When he came in during April to inquire as to that vacation pay, he again asked Pezulich about the possibility of his recall. Pezulich told him, ''No, not until this thing is over.'' Mollison asked ''What thing?'' and Pezulich responded, ''Oh Lawnce, you know more than I do.'' He has never been recalled.

Reinaldo Rivera had been employed since 1988. He operated the hydraulic press and sometimes operated the power press. When he laid Rivera off about March 31, Pezulich told him that he would be off for a few weeks. As described above, Rivera had been subjected to coercive conduct by Toussaint, whom Pezulich consulted with respect to the selection of all the employees that were laid off.

Retained after Rivera's layoff were Robert Cephas, a more senior die setter; Joseph Carpenter, a more senior hydraulic press operator (known as Clifford); and a less senior power press operator named Alvin Lee. Cephas operated the hydraulic press after Rivera's layoff.

6. Respondent's economic defense

Respondent argues that the foregoing layoffs were economically rather than discriminatorily motivated. In support thereof, it adduced some financial and other records.

Thus, it was shown that in January 1993, Respondent reduced its workweek to 4 days and canceled its employees' health insurance coverage. According to Pezulich, they remained on a 4-day work schedule for 4 to 6 months. He did not recall when they returned to a full schedule. Faryniarz testified, however, that while there were times in 1993 that they worked only 4 days per week, they were working 5 days per week in 1994.

In November 1994, according to Pezulich and Respondent's Exhibit 3, Respondent reduced the insurance coverage on one of its buildings and eliminated income and extra expenses coverage, resulting in a refund of $3674 in premiums. Respondent also demonstrated that its sales went from approximately $5,722,000 in 1991 to $5,706,000 in 1992; $5,081,000 in 1993; and $3,674,000 for the first 9 months of 1994. When the handwritten figures on Union Exhibit 1,

[22] Pezulich doubted that he told Veliz that he could expect to be recalled because Veliz spoke little English. Noting the mutually corroborative testimony of various employees as to what they were told about when they might be recalled, I credit Veliz.

[23] Pezulich denied ever telling Faryniarz when he might return to work. He claimed that when he laid Faryniarz off he stated that there might be an opportunity if the business picked up. I have found Faryniarz to be a thoroughly credible witness and accept his testimony over that of Pezulich, in which I have less confidence.

which purport to show Respondent's sales for the last 3 months of 1994, are added in, it appears that 1994 was slightly better than 1993, with total sales of $5,116, 540.[24]

Countering Respondent's claims of a declining workload and work force in early 1994 are Respondent's efforts to hire and its hiring of new employees in that year. Advertisements were placed in Brooklyn community newspapers on January 31 and February 7, 14, and 21, 1994, seeking metal polishers. The advertisements listed Respondent's telephone number and the name of Pezulich's secretary. Additional ads ran on August 12 and 14, seeking a polisher. Pezulich had no recollection of advertising for help in those periods but did not deny that Respondent had done so.

Respondent's records indicate that it had been hiring and reinstating employees in 1993 and through much of 1994. These hires include Carl Balduccio—October 20, 1993, Rubin Ramos and Rafael Rodriguez—October 27, 1993, Jose Veliz—December 15, 1993, Alex Castro and Rocky Ingram—January 26, 1994, Joseph Curatola—February 9, 1994, Kenneth Rudolph—April 13, 1994, Darin Cardoza—May 4, 1994, Jesse Bumbray—November 10, 1994, Julio Rivera (reinstated)—November 15, 1994, and George Thomas—hired in April 1993 and reinstated on November 28, 1994.

7. Analysis—discrimination

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning on the employer's motivation. Under that test the Board stated in *Fluor Daniel, Inc*., 304 NLRB 970 (1991):

> [T]he General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled; however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp*., 305 NLRB 219 (1991); *Visador Co*., 303 NLRB 1039, 1044 (1991); *Associacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

I am satisfied that the General Counsel has established the requisite prima facie case on the record before me. Respondent was aware of the union activity and had demonstrated both its hostility toward that activity and its willingness to contravene its employees' statutory rights to thwart it. The coercive conduct was engaged in by the same individuals who made the decisions and selections for layoff, a fact which supports the inference of illegal motivation. *Corrugated Partitions West*, 275 NLRB 894, 902 (1985). Moreover, it cannot be gainsaid but that the layoff or termination of employees who were engaged in the union activity would tend to discourage them, and others, from supporting the Union. In this regard, I note, particularly, that Faryniarz, Dargan, Rivera, and Mollison were subjected to threats, interrogation, and promises of benefit and that those coercive acts included repeated threats of layoff and discharge. The layoffs were the fulfillment of such threats. Noted, too, is the fact that the laid-off employees had attended union meetings, meetings which Toussaint acknowledged were observed by management, including himself. Lubin saw Toussaint, and was likely seen by him, at the first union meeting. Faryniarz, Dargan (the RD petitioner), and Mollison were among those who spoke up at the Employer' s March 9 antiunion meeting.

Respondent's attempt to interpose an economic defense, on the other hand, falls short of carrying its burden to rebut the General Counsel's prima facie case. Its sales figures show no significant change from the prior year and, in the absence of the supporting documentation sought by the General Counsel, are not entirely reliable. It is noteworthy that in 1993 Respondent had gone to a 4-day workweek for a portion of the year, when it had similar earnings. In 1994, after the advent of activity on behalf of a potentially less compliant union, Respondent chose not to save the employees from the hardship of layoffs by simply reducing the workweek. Rather, it chose to layoff, and then never recall, employees, including some obviously valued employees of long tenure. No explanation was offered for its decision to lay off employees rather than reduce the workweek or to fail to recall employees, both of which were contrary to its prior practices.

Respondent took other steps which, it contends, establishes its economic weakness, the cancellation of its employees' health insurance, and the reduction of the insurance on one of its buildings. Those acts were, at best, ambiguous. They suggest that Respondent may have been having financial problems. However, other plausible explanations, including a desire to maximize profits, a decrease in the value of the building or the acquisition of other insurance, may exist.

Belying Respondent's defense of an economic condition mandating layoffs is the evidence that, while it was laying those employees off, it was advertising for new employees and continued from late in 1993 through much of 1994 to hire new employees or rehire those who had earlier worked for the Company. Respondent neither denied nor explained

[24] Counsel for the General Counsel had subpoenaed more detailed financial records which, notwithstanding my order for their production, Respondent failed to produce, providing only its sales figures. While the sales figures are probably the best indication of the amount of work in the shop, the General Counsel was entitled to examine the other records to determine the veracity of Respondent's claims, and is entitled to an adverse inference from its failure to comply with the subpoena and my order.

this activity. Further negating Respondent's defense is Pezulich's virtual admission, to Mollison, that these employees would not be recalled ''until this thing is over.'' The reference could only be to the union activity, particularly in light of Pezulich's further statement, when queried by Mollison, ''Oh Lawnce, you know more than I do.''

Based thereon, I must conclude that the General Counsel's prima facie case of unlawful motivation remains unrebutted. I therefore find that Respondent laid off, and failed and refused to recall, Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones,[25] Lawnce Mollison, and Reinaldo Rivera because of their union activity, in violation of Section 8(a)(3).

I also find that Elick Dargan's health insurance was canceled in violation of Section 8(a)(3). His uncontradicted testimony that Connie Pezulich told him that it would be canceled ''until this matter with the union is solved'' establishes the unlawful motivation.

8. Analysis—the challenges

Consideration of the eligibility of the challenged voters begins with the premise that a ''party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote.'' *Golden Fan Inn*, 281 NLRB 226, 230, fn. 24 (1986).

The Employer challenged the ballots of Marian Faryniarz, Lawnce Mollison, Jose Veliz, Jean Lubin, and Theodore Jones on the grounds that they had been laid off and were not employed by the Employer at the time of the election. I have found these individuals to have been discriminatorily laid off and denied recall. As they would have been working on the established eligibility date but for Respondent's discrimination against them, they remained employees who were eligible to vote. I shall recommend that the challenges to their ballots be overruled. *C & L Systems Corp*., 299 NLRB 366, 386 (1990); *Ra-Rich Mfg. Corp*. 120 NLRB 1444, 1447 (1958).

The Employer also challenged the ballots cast by Rubin Ramos, Jerome Smith, Keith Jackson, Lendo Bronson, and Anthony James on the grounds that they had been laid off and were not employed by the Employer at the time of the election. The record establishes that they (except possibly Ramos) were laid off. It also establishes that most of those laid off were told that they could expect to be recalled within a relatively short period of time and Respondent had a practice of recalling or rehiring those whom it laid off. No evidence was adduced to show that there was any fundamental change in the nature or scope of Respondent's business such as might suggest that they had no reasonable expectancy of recall. *Apex Paper Box Co*., 302 NLRB 67, 68 (1991). Indeed, the Employer never claimed that these or any employees were unlikely to be recalled. Neither did it contend that their jobs had been eliminated. See *Globe Molded Plastics Co*., 200 NLRB 377 (1972), where despite depressed conditions in the employer's industry precluding any reasonable anticipation of increased business in the foreseeable future, the eligible voters (who were on strike) were not disenfranchised in the absence of evidence that their work had been permanently abolished.

With respect to Ramos, I must conclude that the Employer has failed to show that he was not an employee on the eligibility date or at the time of the election. I shall recommend that the challenge to his ballot be overruled.

In the absence of evidence that the laid-off voters had no reasonable expectancy of recall in the near future, I must overrule the challenges and find all of these employees (including those whom I have found to have been discriminatorily laid off) eligible to vote.

The parties stipulated that Yevgeny Chernyakov and Ellsworth Quammie were eligible voters whose names were somehow omitted from the list. The challenges to their ballots must be overruled.

Rocco Lacona was challenged by the Intervenor, Local 455, on the grounds that he was a carpenter, a category expressly excluded from the unit. The testimony of Quammie to the effect that he only saw Lacona work with wood during the limited times that he observed him is, I find, insufficient to overcome Pezulich's testimony that Lacona was an assembler, working with both metal and wood products. As an assembler, he would be within the overall production and maintenance unit. I shall recommend that the challenge to his ballot be overruled.

CONCLUSIONS OF LAW

1. By interrogating employees concerning their union activities and sympathies, by creating the impression that the employees' union activities were under the surveillance of the Employer, by promising employees benefits for not engaging in union activities, and by threatening employees that it would close the business and with layoff, discharge, and other reprisals because they had engaged in union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Giovanni Trevisano, Ruperto Vasquez, and Benjamin Ramirez because they engaged in union and other protected concerted activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By laying off and failing and refusing to recall Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, and Reinaldo Rivera because of their union activities and the union activities of other employees, and by canceling the health insurance of Elick Dargan because of the union activities in which he and other employees were engaged, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. Respondent has not, in any other manner alleged in the complaint, violated the Act.

5. Jean Lubin, Jose Veliz, Marian Faryniarz, Theodore Jones, Lawnce Mollison, Anthony Thames, Jerome Smith, Lendo Bronson, Keith Jackson, Rubin Ramos, Yevgeny Chernyakov, Ellsworth Quammie, and Rocco Lacona were eligible voters; the challenges to their ballots should be overruled.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease

[25] Jones did not testify and the record is sparse in regard to him. Given that the layoffs in 1994 were inconsistent with the short workweeks of 1993 under similar economic conditions, I would conclude that he was unlawfully swept up with those who were laid off because of their known, perceived, or suspected union activities.

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged or laid off and failed and refused to recall employees, the Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having discriminatorily canceled Elick Dargan's health insurance, it must reinstate that insurance and make him whole for any premiums paid or medical expenses incurred as a result of its unlawful actions, with interest.

[Recommended Order omitted from publication.]